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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 825

PEOPLE OF THE STATE OF CALIFORNIA,
Appellants,

vs.

UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION,
Respondents.

On Appeal from the United States District Court
for the District of Utah, Central Division

Brief of the People of the State of California in Opposition to Motions of El Paso Natural Gas Company to Dismiss or Affirm and of the United States of America to Dismiss

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1101

PEOPLE OF THE STATE OF CALIFORNIA,
Appellants,

vs.

UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION,
Respondents.

On Appeal from the United States District Court for the District of Utah, Central Division

Brief of the People of the State of California in Opposition to Motions of El Paso Natural Gas Company to Dismiss or Affirm and of the United States of America to Dismiss

The People of the State of California (California), appellant herein, requests this court to deny the Motions of Appellee, El Paso Natural Gas Company (El Paso) and the Motion of the United States of America, Appellee, that California's appeal be dismissed.

FURTHER PROCEEDINGS BELOW

Since Notice of Appeal was filed herein by California there has been filed in the lower court a Stipulation entered into by the United States and El Paso agreeing upon a Decree for Divestiture. That Stipulation and Decree are set forth in the Statement Supplementing Motions of El Paso Natural Gas Company to Dismiss or Affirm. This Stipulation and Decree, as will be shown, are crucial to a determination of this cause since they represent an improper departure on the part of the United States and El Paso from the mandate of this court in *United States of America v. El Paso Natural Gas Company*, 376 U.S. 651.

ARGUMENT

This reply is addressed to the contentions of El Paso and the United States of America.

It is significant that neither El Paso nor the United States choose to discuss the role of California in these proceedings. California is not before this court as an ordinary party in an ordinary proceeding. California is here in reality as an agent of this court. It is particularly important that the court take note of the function of California in this case at this time and of the procedure California is employing to implement that role.

In *Continental Co. v. United States*, 259 U.S. 156 (1921) this court spoke of its authority with reference to the enforcement of its decrees in antitrust cases. Note this at page 165 in the *Continental* Case:

> "Ordinarily the scope of our review of the decree of the District Court would be limited to the assignments of error of the appellants, but in this case, as the decree which is before us was entered under a mandate of this court, we have jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the District Court the duty of formu-

lating a decree in compliance with the principles announced in our judgment of reversal and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."

And in *United States v. Du Pont & Co.*, 366 U.S. 316 (1961) this supreme power is reiterated:

"First of all, the (divestiture) decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out."

That California is an appellant here is beyond question. This court need only look to the persistence of California and the history of this entire litigation to conclude that it is the fact that but for the place of California in insisting upon protection of the monopoly laws for its gas consumers that this appeal would have been dropped long ago. Indeed in *California v. Federal Power Commission*, 369 U.S. 482, the United States argued in behalf of this unlawful merger and following the court's pronouncement therein was most reluctant to proceed with the prosecution of the monopoly complaint in the District Court in Utah. Again it was most reluctant following the dismissal of the government's cause by the trial court to prosecute an appeal to the United States Supreme Court. This case is at this point today because of the insistance on the part of a state that monopoly laws were intended to apply to the natural gas industry.

The Plenary Power of the Court Is Not to Be Frustrated.

The thrust of the Motions by Appellees herein comes from a reliance upon rules dealing with intervention in ordinary cases and under ordinary circumstances. This is not such

a case. This matter is being brought to the attention of the United States Supreme Court to determine whether or not its mandate is being met. And neither the views of a lower court nor the procedural inhibitions which sometimes prescribe a rigid route of review—none of these things may be erected as a barrier against scrutiny by this court of that which it directed be done.

And so it follows that since California is an Appellant herein and thus a proper party, and since a specific mandate to divest "without delay" and to create a competitive new company is ignored, then all of those arguments by Appellees dealing with usual rules as to intervention become meaningless. California is not the ordinary applicant seeking intervention. California is a proper party which is stating to this court that it should review its own mandate. Unless this be done the mandate will be violated.

The Question of Intervention.

California maintains that it is entitled to intervene in any event as a matter of right. This court is asked to take notice from *California v. Federal Power Commission*, supra, and *United States v. El Paso Natural Gas Company*, supra, and the long history of litigation herein as to the critical role California played. It is California and its gas consumers which are most affected by these proceedings. It is California which was faced with exhorbitant and unlawful rate increases by virtue of this unlawful acquisition of the Pacific Northwest Pipeline Corporation. And it is California which under the letter and spirit of the monopoly laws and coming from the mandate of this court has the right to insist that there be created by the lower court within a reasonably prompt period of time a competitive pipeline so situated in terms of financial condition and

stability as to furnish competition to the California gas market.

At one time in these proceedings the United States took the rigid position that a sale of the Pacific Northwest Pipeline Corporation to independent third parties—they being qualified according to the government—was the only method which would meet the mandate. And that being the case the United States was in good position to argue that it was representing the public interest and particularly was enforcing the mandate of this court.

The Change in Position and Its Impact upon California.

Now the United States has changed its position almost completely. Whereas it previously advocated an outright sale it now permits a period of 18 months for an exchange of stock and that failing, a sale to the general public. This of course follows the period of time for so called "New Company", the successor to Pacific Northwest Pipeline Corporation, to obtain a certificate of operating authority from the Federal Power Commission. The insistance upon expedition in meeting the mandate of the court and the insistance upon sale to parties with no relationship to El Paso, whom the government itself sponsored,—these have been abandoned. And this substantial change in position represents a default in the obligation of the United States toward the monopoly laws and toward the mandate of this court. Such being the case it removes any possible validity to the government's position that its role in the District Court encompasses the public interest and the so called private interest. Any reliance by California, by the other western states or any parties upon the role of the government as their protector was misplaced.

The outright separation the Supreme Court dictated is clear. The past significance of this litigation to California is equally clear. In looking into the future since the point and purpose of this long litigation was to promote competition in the natural gas markets in the western United States and particularly the California market, it can be seen that California clearly possesses standing to intervene as a matter of right. California refers the court to *United States v. Southern Pacific Co.*, 259 U.S. 214 (1921), which was concerned with a violation of the Sherman Act brought about by the joinder of the Central Pacific Railway System and the Southern Pacific Railway System. These rails normally were competitors for rail traffic moving between California and the Atlantic seaboard and intermediate places. The court there pronounced that union in violation of the Sherman Act and realizing the complexities of separation and divestiture stated "to the end that an appropriate decree may be framed, the District Court may and should bring in additional parties whenever that may become advisable in executing our directions."

California Is Entitled to Intervene as a Matter of Right and Its Appeal Was Timely.

El Paso premises its Motion to Dismiss upon the notion that California has no standing to intervene which really means no interest to protect and secondly its appeal is premature since the denial of its petition to intervene was interlocutory in nature.

The reality of the trial proceedings disclose that California sought to intervene and that a ruling upon that request was withheld almost the entire period of trial. The harsh fact of the matter is—and this is set forth in full in the Jurisdictional Statement of California—that the trial

court made it abundantly clear in the peremptory manner in which it cut off oral statements by would be intervenors and the summary manner in which he directed would be intervenors to maintain a constant silence that no intrusion of any sort and no participation however mean would be permitted. The trial court refused all efforts at participation whatsover by pointing out constantly to would be intervenors that they had no standing before him. And, of course, until intervention was granted the court was correct in that attitude. There came a time, however, as the trial days passed and no rulings were forthcoming when even a favorable ruling would have arrived at a time when most of the proceedings had taken place. And thus intervention, unless the trial judge were prepared to go over the record again, would have been somewhat ineffective. Finally, only when California filed a formal motion requesting a ruling did one issue and of course it was a denial.

It is important to understand the substance of these events in terms of whether or not the ruling of the court was interlocutory or final. Accepting California's interest in these proceedings it can be seen that the refusal to make a ruling at that point was in reality a denial for so long as a ruling was withheld. The refusal to rule placed California in the role of a mere spectator in the trial court bound to a seat in the court room, observing silently matters in which it had a vital interest. When the ruling ultimately came, then California, since the trial was almost completed and has now in fact been concluded, was completely and irrevocably silenced by an order which removed it completely from any participation in the divestiture proceedings. And analysing the impact of the ruling and not being

misled by the often contradictory and confusing terms "interlocutory" as against "final"; the trial court effectively and permanently prevented California from participating in the divestiture proceedings. This then from the reality of the record was completely effective as to California and its finality can be adjudged by the fact that the divestiture proceedings are concluded—or almost so—and California has never been permitted to protect its proper interest below.

It is difficult to imagine a situation where the right to intervene is more clearly established. The divestiture proceedings here were ordered by the Supreme Court solely because of the adverse effect of this merger upon the consumers of the State of California. For over ten years California has been the principal moving force in this complex litigation. It is submitted that California is entitled to intervene as a matter of right solely because California and California alone persisted in the position that this merger was unlawful. And now that the interests of California are not being protected by the United States that right and the exercise of it becomes even more critical not only to California but to the Supreme Court with reference to its mandate.

And as to the appealability of the order below denying intervention since California asserts its right to intervene as a matter of right such order is clearly appealable. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, 331 U.S. 519, 916 L.Ed. 1646, 675 S.Ct. 1387 (1946). *Sutphen Estates v. U.S.*, 342 U.S. 19, 96 L. Ed. 19, 72 S.Ct. 14 (1951). Anno. 96 L.Ed. 25, Anno. 15 A.L.R. (2d) 340, 360.

The Cases Cited by El Paso Have no Relationship Coming from the Facts Therein to This Cause.

THE ABDICATION OF RESPONSIBILITY.

The United States is ignoring the language of *California v. Federal Power Commission* which spelled out the duty of the Attorney General of the United States toward enforcement of the monopoly laws upon a regulated industry. It specifically struck down a decision of the FPC which purported to authorize that which was subsequently determined to be in violation of Section 7 of the Clayton Act. In essence this court said that enforcement of monopoly laws is the business of the United States and of its Attorney General.

Now the United States is washing its hands of one of the most critical features of any monopoly litigation. Having been handed a significant landmark victory in *California v. Federal Power Commission* and in *United States v. El Paso*, it is frustrating those decisions by a failure to implement them. In so many words the government has lost its concern that the divestiture be "without delay." And an examination of the proposed Decree for Divestiture discloses the creation of a new company anything but competitive and anything but independent. Then in startling fashion the government in its Motion to Dismiss refers all complainants such as California and Cascade Natural Gas Company to the Federal Power Commission in the event the Decree has an adverse effect upon their respective interests. The government is conceding the reality of future aggrievement to the western states and California when at Page 14 of its Motion to Dismiss it suggests that such aggrievement may be cured in this manner—"the proper remedy lies with the Federal Power Commission . . . ."

Beyond contradiction the laws speaks clearly to the point that the Natural Gas Act does not give to the Federal Power Commission the power to pass upon title to property of other assets. And the Decree which is before the lower court parcels out assets, properties and titles thereto all irrevocably. While this is rather fundamental, perhaps it should be explored. If a natural gas company seeking gas reserves or acquiring realty for the construction of an office building or gaining any physical properties is confronted with a third party claim as to title thereto that dispute is resolved in a court of appropriate jurisdiction. Title disputes and the resolution thereof are not entertained by the Federal Power Commission.

And the Decree of the lower court when it assigns properties between El Paso and new company is passing title thereto. And there is no way in which the Federal Power Commission even when coming upon a newly created company so constituted as to be noncompetitive may alter that situation.

The only place in which new company may be created so as to be competitive and with any degree of timeliness is in the United States District Court. It is a complete abdication of the responsibility of the United States to change the position it took during the divestiture proceedings and now refer to the Federal Power Commission the determination of whether or not the new company is properly endowed with facilities and assets permitting it to be competitive. If the Power Commission determines that it be not competitive for want of sufficient assets or physical properties, what may it do about it? May it order El Paso to give up properties which a United State District Court has given to it? May it order equity and debt holders to furnish additional capital to new company? Obviously not.

The Future of the California Gas Market.

California has an ever growing appetite for natural gas. And the day will be upon us when California will be seeking another additional out of state gas supply and logically from the Northwest. This is the crux of this long litigation. Unless new company be given that type of beginning which puts it in a position to be competitive for the California market then California is deprived of an alternate and competing source of energy. The proposed Decree of Divestiture inhibits and prohibits against any such venture on the part of new company. The plan in providing for the obtaining of a certificate places a time period upon new company of at least one year. It is common knowledge that certificate proceedings of this nature and magnitude cannot be completed before the Federal Power Commission in less than one year and in the writer's opinion undoubtedly more nearly two years. And then new company controlled by a chief executive officer uncertain as to its ultimate equity holders and awaiting the consummation of a stock exchange offer or a general offering all taking up to 3 years—such a company is restrained in its activities, inhibited in its plans and obviously precluded from launching so momentous a project as a new pipeline to California. That time is of the essence is made more so because we are dealing here with an ever growing market concerning a commodity which is a depleting asset.

In urging that California may appeal only when the Decree becomes final, appellees choose to ignore that California is invoking the plenary power of this court. They also choose to ignore the deficiencies in the proposed Decree and suggest that the harm be done; that the further scrambling of assets commence and that upon a further

change of position then California is entitled to relief. If the Decree falls short of the standards of the monopoly laws and of the mandate of this court, it would be foolish in the extreme to permit it to become reality. California's appeal is somewhat in the nature of a plea to enjoin the proceedings below just as years ago the very stock acquisition which lead to these events ought to have been enjoined. And how helpful it would have been if this matter could have been enjoined and then resolved rather than as it turned out.

Since a grave question has been raised as to the lawfulness of the Decree and since the possibility exists that California may be correct, then the interest of the United States, and its citizens, the interest of California and its ratepayers, and the interest of El Paso and its stockholders dictate that the question be resolved before the damage be done. Surely it would be prudent and in the interest of El Paso and in the interest of the government's obligation toward the monopoly laws not to take the chance that California's position be a correct one. And in view of the fact that the Decree now provides for a period of at least 4 years before it becomes final and since California has no objection to taking the time required to resolve its grievance, then further time as measured against a violation of Section 7 which has been a reality since 1956 to which is added a 4 year period by the Decree seems a reasonable request. California is merely inviting a complete review now so that if it be correct no further harm be done. And at the same time that California is strongly urging that its position is correct it willingly courts the danger that the court may disagree with California's position.

CONCLUSION

The question before the court is a grave one. Divestiture is an integral part of the enforcement of the monopoly laws. In a case as here where a sovereign state makes the complaint that the proposed Decree for Divestiture is an abdication of the responsibility of the United States and is directly contrary to the mandate of this court, such question should be reviewed. And the Motions to Dismiss which completely fail to discuss the power of this court with reference to decrees should be denied. California is entitled to complete review of this matter coming before this court as a proper party directing to its attention a flagrant violation of its mandate. California comes before this court because of its great stake in this cause as a party entitled to intervention as a matter of right. California urges that the Motions to Dismiss be denied and that the court note its appeal.

Respectfully submitted,

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